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In The

Supreme Court of the United States

October Term, 1992

THOMAS LEE DEAL,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. IF, AS ARGUED BY THE GOVERNMENT, CONGRESS CHOSE OR IS PRESUMED TO HAVE CHOSEN ITS WORDS CAREFULLY, THE COURT SHOULD FIND IN FAVOR OF THE PETITIONER, BECAUSE CONGRESS CAREFULLY CHOSE "SECOND OR SUBSEQUENT CONVICTION" RATHER THAN "SECOND OR SUBSEQUENT OFFENSE."

A. The Government's Argument Presumes That Congress Carefully Chose the Language of Section 924(c).

As noted in the Petitioner's opening brief, 18 U.S.C. § 924(c) was offered as an amendment on the House floor by Representative Poff, and the amendment passed on the same day it was offered. *See* Br. Pet. 15; *see also Busic v. United States*, 446 U.S. 398, 405 (1980); *Simpson v. United States*, 435 U.S. 6, 13 (1978). Because of "the haste in this legislation," there was "considerable confusion as to the meaning of words." 114 Cong. Rec. 22,243 (1968) (statement of Rep. Hunt, supporting the Casey amendment).

In its brief, the Government nonetheless argues that "when Congress intends to enact a recidivist statute . . . it knows how to choose the language necessary to achieve that result." Br. Resp. 16. Reviewing other recidivist statutes, the Government concludes that the "language *chosen* by Congress in Section 924(c) is far broader" than that found in the other statutes. Br. Resp. 17-18 (emphasis added). The argument thus eschews the possibility that Congress was inartful in its draftsmanship and embraces the proposition that Congress carefully chose the language of section 924(c).

B. If Congress Carefully Chose "Second or Subsequent Conviction," the Court Should Rule in Favor of the Petitioner.

If, as the Government argues, Congress chose or is presumed to have chosen carefully the language of Section 924(c), then the language reflects that Congress made a careful distinction between the imposition of the five-year enhancement and the imposition of the twenty-year enhancement. For the language of the statute expressly requires the imposition of a consecutive five-year sentence upon a person who *"uses or carries a firearm"* during any crime of violence, but calls for the imposition of the twenty-year enhancement only *"[i]n the case of his second or subsequent conviction."* 18 U.S.C. § 924(c) (emphasis added). The Government further argues that the Court should ignore this difference in language (presumably carefully drafted) and that it should change the latter phrase to read, "whenever an offender uses or carries a firearm for the second time" during a crime of violence. Resp. Br. 21.

To the Government's argument, "'[t]he short answer is that Congress did not write the statute that way.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.* (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). In fact, with regard to the twenty-year enhancement, Congress specifically excluded

the phrase "subsequent *offense*" and in its stead substituted the phrase "second or subsequent *conviction*." *See* H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968). The Court, therefore, should refrain from concluding here that the five-year and the twenty-year enhancement clauses have the same meaning. *Russello*, 464 U.S. at 23; *see also Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (stating that exclusion of language by the Conference Committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact").

In sum, if the Court agrees with the principles underlying the Government's argument and the attendant principles of statutory construction, the Court should find in favor of the Petitioner because Congress chose "second or subsequent conviction" and rejected "second or subsequent offense."

II. EVEN WHEN CONGRESS HAS CHOSEN TO USE THE WORDS "SECOND OR SUBSEQUENT OFFENSE," IT HAS REQUIRED A PRIOR CONVICTION AS A PREREQUISITE TO THE IMPOSITION OF AN ENHANCED SENTENCE.

A. The Government Argues That "Second or Subsequent Conviction" Means "Second or Subsequent Offense."

The Government also argues that "Members of Congress understood the phrase 'second or subsequent conviction' to refer simply to the commission of additional offenses that result in convictions," Br. Resp. 19, and that they "used the terms 'second conviction' and 'second

offense' interchangeably." Br. Resp. 21. Thus, the Government would have the Court conclude that "second or subsequent conviction" must mean "second or subsequent offense."[1]

B. Congress Expressly Has Stated That an Enhancement for a Second or Subsequent Offense Requires a Prior Conviction.

Even if the Court rewrites the statute in this manner, it does not advance the Government's argument. As noted in the Petitioner's opening brief, an examination of related federal statutes, if relevant, supports the conclusion "that section 924(c)'s twenty-year enhancement was intended to apply to an offender who has a prior conviction under that section." Br. Pet. 20. Specifically, when Congress legislated an enhanced sentence for a drug offender for "the offender's second or subsequent offense," it expressly stated that "a person shall be considered convicted of a second or subsequent offense, if, prior to the commission of such offenses, one or more prior convictions of him for a [narcotics] felony . . . have become final." 21 U.S.C. § 962(b).[2]

---

[1] The premise of this argument is that Congress simply was inartful in debating about and drafting the language of section 924(c). The argument thus is inconsistent with the Government's other argument that Congress chose or is presumed to have chosen carefully the language of the statute. *See supra* text, at 2.

[2] The Government argues that the prerequisite of a prior conviction for the application of the twenty-year enhancement would lead a prosecutor to "simply charge and try each Section 924(c) offense and its related substantive crime seriatim, thereby ensuring the entry of a judgment of conviction on each succeeding offense before the next violation of Section 924(c) was charged and tried." Br. Resp. 14. The Government offers no evidence that this has occurred with regard to other related recidivist statutes, such as 21 U.S.C. § 962(b), and no explanation for why this even might occur if section 924(c) is construed and applied in the same manner as the related statutes are applied.

Thus, even when Congress expressly has used the term "second or subsequent offense," it has required a *prior* conviction as a prerequisite for the imposition of an enhanced sentence. The "related federal statute[ ] fortif[ies] [the] conclusion," *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 115 (1983), that a prior conviction is a prerequisite to the imposition of section 924(c)'s twenty-year enhancement.

Insofar as Members of Congress tend to use interchangeably "second conviction" and "second offense," as argued by the Government, Br. Resp. 22-23, the related narcotics statute clarifies any attendant ambiguity in favor of the Petitioner. Even if the related statute did not clarify the ambiguity, however, in construing statutes this Court has been extremely wary of relying on the statements of individual legislators (much less their choices of vocabulary) made during floor debates. *See S & E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1972). The Court also repeatedly has refused to rely on postenactment statements by individual legislators and has stated that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 119 (1988); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447

U.S. 102, 117 (1980); *see also Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). Thus, even if Congress had not precisely defined "second or subsequent offense" to include a prior conviction, the Government's reliance on the contemporaneous and subsequent statements of individual legislators would be unpersuasive to establish that "second or subsequent conviction" means "second or subsequent offense."

III. THERE IS NO ANOMALY IN THE PETITIONER'S CONSTRUCTION OF "SECOND OR SUBSEQUENT CONVICTION."

A. The Government Finds Petitioner's Construction to Be an Anomaly Because the Government Ignores Part of the Clause in Question.

The Petitioner argued in his opening brief that "second or subsequent conviction" means "an additional judgment of conviction entered later in time." *See* Br. Pet. 23-24. In its brief, the Government finds the argument to be an anomaly because "a judgment reflects not only the verdict but also the sentence" and when a judgment has been entered, "the defendant has already been sentenced." Br. Resp. 11. The entire statutory phrase at issue is: "*In the case of his* second or subsequent conviction." 18 U.S.C. § 924(c) (emphasis added). There is no anomaly in the Petitioner's construction of "second or subsequent conviction," and the appearance of one only arises when the words "second or subsequent conviction" are considered apart from the preceding phrase, "in the case of his."

B. The Petitioner's Construction Gives Effect to Every Word of the Clause of the Statute and Is Not Anomalous.

Any interpretation of a statute must give "'effect, if possible, to every clause and word of [the] statute.'" *Moskal v. United States*, 111 S. Ct. 461, 466 (1990) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). As noted in the Petitioner's opening brief, Representative Poff apparently "conceived of each prosecution as involving only one underlying felony and one firearm offense," and "this conception . . . supports the construction of 'in the case of his' as meaning 'in the legal case of'." Br. Pet. 18 n.13. There is no anomaly in the position that Congress intended for the twenty-year enhancement to be imposed *in the legal case* of (*i.e.*, the legal proceeding concerning) an additional judgment of conviction. The Petitioner's construction of the statute, therefore, does not require that a court impose sentence after entry of judgment. It does give effect, however, to every clause and word of the statute. *Moskal*, 111 S. Ct. at 466.

IV. THE HOLDING OF *DICKERSON*, IF APPLICABLE, SUPPORTS THE PETITIONER'S, NOT THE GOVERNMENT'S, POSITION.

A. The Government Misreads *Dickerson* to Hold That "Conviction" Merely Means a "Finding of Guilt."

The Government asks the Court to broadly construe "conviction" as used in the phrase "[i]n the case of his second or subsequent conviction," 18 U.S.C. § 924(c), and thus to hold that it means "a finding of guilt." Br. Resp.

11-12. In support of this position, the Government relies on *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which is purported to have held that a defendant was "convicted," for purposes of 18 U.S.C. § 922(g)(1) and (h)(1), "once his guilty plea was noted by the state court." Br. Resp. 11. Because the facts and holding of *Dickerson* cannot be construed as broadly as the Government argues, *Dickerson*, if applicable, support's the Petitioner's, not the Government's, position in this case.

B. The Court Held in *Dickerson* That "Conviction" Means a "Finding of Guilt Plus a Sentence."

The issue in *Dickerson* was "whether firearms disabilities imposed by 18 U.S.C. §§ 922(g) and (h) . . . apply with respect to a person who pleads guilty to a state offense punishable by imprisonment for more than one year, *when the record of the proceeding subsequently is expunged under state procedure following a successful term of probation.*" *Dickerson*, 460 U.S. at 105 (emphasis added). Sections 922(g) and 922(h) proscribed "any person 'who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year'" from shipping, transporting, or receiving any firearm or ammunition in interstate commerce. *Id.* (footnote omitted).

Briefly, the facts before the Court were the following. Mr. David F. Kennison, the director, chairman of the board, and a shareholder of New Banner Institute, Inc., had entered a plea of guilty to the state offense of carrying a concealed weapon. *Id.* at 106-07. The state court had entered an order noting the guilty plea, deferring entry of

a formal judgment, and placing Mr. Kennison on probation. *Id.* at 107-08. When Mr. Kennison completed the term of probation, the state court's record of the deferred judgment was expunged pursuant to state law. *Id.* The Treasury Department's Bureau of Alcohol, Tobacco, and Firearms later issued a dealer's license to New Banner, but sought to revoke the license after it learned of Mr. Kennison's expunged record. *Id.* at 108-09.

Contrary to the Government's argument in this case, therefore, the issue, the facts, and the holding of *Dickerson* did not involve merely "a finding of guilt" or merely a "guilty plea . . . noted by the state court." Br. Resp. 11. *Dickerson did* involve (1) the entry of a guilty plea, (2) the service of a term of punishment, and (3) the subsequent expungement of the deferred judgment procedure. In its opinion, moreover, this Court recognized the absence of the "*usual* entry of a formal judgment," but it emphasized the presence of (a) the charge . . . , (b) the plea of guilty to that charge, and (c) the court's placing Mr. Kennison upon probation." *Dickerson*, 460 U.S. at 111 (emphasis added). Based upon these facts, the Court held: "Thus, for purposes of the federal gun control laws, we equate a plea of guilty and its notation by the state court, *followed by a sentence of probation*, with being 'convicted' within the language of §§ 922(g) and (h)." *Id.* at 114 (emphasis added).

The holding of *Dickerson* expressly embraces the principle that an indicia of finality, by entry of judgment or imposition and service of a sentence, is a defining characteristic of a "conviction." *Dickerson*, therefore, supports the Petitioner's, not the Government's, position that "conviction" means more than a finding of guilt and

includes at least the entry of judgment or imposition and service of sentence.

C. The Applicability of *Dickerson* Is Questionable

The applicability of *Dickerson* to this case is questionable for two reasons, however. First, in *Dickerson*, this Court stressed that the statutory provisions in question applied not only to persons convicted but also to persons indicted, and it found "the inclusion of the indicted status to be indicative of congressional intent that the term 'convicted' be construed broadly." *United States v. Abreu*, 962 F.2d 1447, 1449 n.3 (10th Cir. 1992) (en banc) (citing and distinguishing *Dickerson*, 460 U.S. at 115-16), *petition for cert. filed*, 51 Crim. L. Rep. (BNA) 3120 (U.S. July 9, 1992) (No. 92-67). The Court also relied on a similar, overlapping gun control statute, noting that nothing on the face of that statute suggested a congressional intent to limit its coverage. *Dickerson*, 460 U.S. at 111.

In the present case, section 924(c) has no broad provision concerning persons indicted that is comparable to the provision considered in *Dickerson*. *See Abreu*, 963 F.2d at 1449 n.3. In addition, unlike the provisions at issue in *Dickerson*, the face of section 924(c) does suggest a congressional intent to limit the coverage of the twenty-year enhancement. As shown in Section I, *supra*, although Congress chose to impose a five-year enhancement upon a person who uses or carries a firearm during a violent felony, it declined to impose the twenty-year enhancement upon a person who "uses or carries a firearm for the second time" or who "commits a second or subsequent

offense." *See supra* text, at 2-3. Instead, Congress specifically limited the language of the twenty-year enhancement to the case of a second or subsequent *conviction*.

Second, "Congress has effectively overruled *Dickerson* in the Firearms Owners' Protection Act . . . , which expressly adopts the state's definition of conviction." *Abreu*, 962 F.2d at 1449 n.3 (citation omitted). The Government argues that this action of Congress does "affect *Dickerson's* conclusion that, when the existence of a conviction turns on federal law, the terms 'convicted' and 'conviction' are satisfied by the entry of a guilty plea or the return of a jury verdict." Br. Resp. 13 n.2. As discussed previously, however, this is not the holding of *Dickerson*. *See supra* text, at 10-11.

For these reasons, the facts and holding of *Dickerson*, if applicable to this case, support the Petitioner's, not the Government's, position.

V. THE PRESUMPTION THAT, WHEN CONGRESS AMENDED SECTION 924(c) IN 1988, IT AGREED WITH *RAWLINGS* SIMPLY BECAUSE IT FAILED TO EXPRESS ITS DISAGREEMENT, IS UNWARRANTED.

A. The Government Argues That Congress' Failure to Disagree with *Rawlings* in 1988 Means That It Agreed with *Rawlings*.

The Government notes that, in 1988, Congress amended section 924(c) and "increased from 10 to 20 years the penalty that must be imposed in the event of a 'second or subsequent conviction.'" Br. Resp. 23. The Government also notes that this "increase in the available

punishment postdated the Eleventh Circuit's decision in [*United States v. Rawlings*, 821 F.2d 1543 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987)], which was then the only published decision by any court of appeals construing the 'second or subsequent' language in Section 924(c)." Br. Resp. 23. On this basis, the Government argues that "Congress's failure to express any disagreement with that interpretation is particularly damaging to petitioner's claim here," Br. Resp. 24, because Congress normally can be presumed to know the interpretation given to an old law incorporated into a new enactment. Br. Resp. 23 (citing *Rodriguez v. United States*, 480 U.S. 522, 525 (1987), and *Lorillard v. Pons*, 434 U.S. 575, 581 (1978)).

B. If Congress Adopted *Rawlings*, It Also Adopted Applications of Section 924(c) That Are Inconsistent with *Rawlings*.

The Government's reliance on the presumption, generally known in judicial and regulatory contexts as the re-enactment doctrine, *see, e.g., Peoples Federal Savings and Loan Ass'n v. Commissioner*, 948 F.2d 289, 300 (6th Cir. 1991), is unjustified in this case. First, although *Rawlings* was the only court of appeals case that addressed directly the meaning of "second or subsequent" at the time of the 1988 amendment, at least one other court of appeals had published an opinion affirming two consecutive five-year sentences for two violations of section 924(c) charged in one indictment. *See United States v. Fontanilla*, 849 F.2d 1257, 1257-58 (9th Cir. 1988); *see also United States v. Chalan*, 812 F.2d 1302, 1315 (10th Cir. 1987) (Government objected in district court only on the ground that the five-year sentences were concurrent), *cert. denied*, 488 U.S. 983

(1988). In *Fontanilla*, moreover, the Government did not cross-appeal the two consecutive five-year sentences. *See Fontanilla*, 849 F.2d at 1257-58. Thus, at best it can be presumed that, in enacting the 1988 amendment, Congress knew about the inconsistent application of section 924(c) across the circuits and knew that the Government had no uniform enforcement policy concerning the meaning of "second or subsequent conviction."[3]

C. Because Congress Is Presumed to Know Only the Well-Established Interpretation, the Presumption Is Unwarranted in This Case.

Second, the re-enactment doctrine as articulated by this Court does not mean that Congress, when amending a portion of a statute, adopts any and all case law that is extant concerning any part of the statute. The doctrine presumes only that Congress acted with full awareness of "the *well-established* judicial interpretation of the law." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (emphasis added); *see also Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Long before Congress enacted the ADEA, it was well established that there was a right to a jury trial in private actions. . . .").

When the Court has employed the doctrine, moreover, it nonetheless has reviewed the legislative history of the statute in question to ensure that Congress in fact had

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[3] In fact, as late as 1991, the Government did not cross-appeal consecutive five-year sentences for multiple violations of section 924(c) that were charged in one indictment. *See United States v. Luskin*, 926 F.2d 372, 374 n.2 (4th Cir.), *cert. denied*, 112 S. Ct. 68 (1991).

knowledge of the well-established judicial interpretations of the law. *See, e.g., Rodriguez*, 480 U.S. at 525; *Lorillard*, 434 U.S. at 480-83. As recognized by the Sixth Circuit Court of Appeals in its extensive review of this Court's use of the re-enactment doctrine in the regulatory context, this Court has used the doctrine as an "interpretive tool," but has based its decisions "primarily on its ability to read the clear record of legislative intent concerning the precise issue in the case." *Peoples Federal Savings and Loan Ass'n*, 948 F.2d at 301.

If there is no indication that Congress has considered the well-established judicial interpretation or the pre-existing regulation, the re-enactment doctrine is useless as an interpretive tool:

> The re-enactment doctrine is merely an interpretative tool fashioned by the courts for their own use in construing ambiguous legislation. It is most useful in situations where there is some indication that Congress noted or considered the regulations in effect at the time of its action. Otherwise, the doctrine may be as doubtful as the silence of the statutes and legislative history to which it is applied.

Id. at 302-03 (footnote omitted). As stated by Judge Learned Hand, " '[t]o suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears . . . unwarranted.' " *Id.* at 303 n.8 (quoting *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976 (2d Cir.), *cert. denied*, 302 U.S. 768 (1937)).

In the present case, the opinion in *Rawlings* was not the "well-established judicial interpretation" of "second

or subsequent conviction" when Congress amended section 924(c) in 1988. If the interpretation of the statute by one circuit even can be counted as "established," then the implementation of the statute and the practice of the Government in a different circuit is at least as established. *See Fontanilla*, 849 F.2d at 1257-58.

More importantly, however, the legislative history of the 1988 amendment does not mention *Rawlings* or expressly indicate that Congress acted "with full awareness" of the opinion. *See Rodriguez*, 480 U.S. at 525. In these circumstances, it is far from "overwhelmingly clear," *id.*, that Congress intended to adopt *Rawlings* by virtue of its amendment only of the term of imprisonment, and the application of the re-enactment doctrine, thus, is particularly inappropriate in this case. *Cf. Lorillard*, 434 U.S. at 581. In short, the silence of Congress in 1988 with regard to *Rawlings* is "as doubtful as the silence of the statute[ ] and legislative history to which it is applied." *Peoples Federal Savings and Loan Ass'n*, 948 F.2d at 302-03 (footnote omitted).

CONCLUSION

For the foregoing additional reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to vacate the Petitioner's sentence and to remand to the district court for resentencing.

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